TAN SRI ABDUL KHALID IBRAHIM A

v.

BANK ISLAM MALAYSIA BHD

COURT OF APPEAL, PUTRAJAYA B
LOW HOP BING JCA
ZAHARAH IBRAHIM JCA
AZIAH ALI JCA
[CIVIL APPEAL NO: W-02(IM)-3019-12-2011]
14 MAY 2012 C

BANKING: *Islamic banking - Shariah Advisory Council (SAC) - Roles and functions - Court to refer questions concerning Shariah matter to Shariah Advisory Council - Whether High Court functus officio - Whether there was a previous reference to SAC for a ruling - Whether* D *an usurpation of court's judicial power - Whether ss. 56 and 57 Central Bank of Malaysia Act 2009 valid, constitutional and had retrospective effect - Central Bank of Malaysia Act 1958 (Repealed), s. 16B*

ISLAMIC LAW: *Banking and finance - Shariah Advisory Council* E *(SAC) - Roles and functions - Court to refer questions concerning Shariah matter to Shariah Advisory Council - Whether High Court functus officio - Whether there was a previous reference to SAC for a ruling - Whether an usurpation of court's judicial power - Whether ss. 56 and 57 Central Bank of Malaysia Act 2009 valid, constitutional and had retrospective* F *effect - Central Bank of Malaysia Act 1958 (Repealed), s. 16B*

CONSTITUTIONAL LAW: *Courts - Judicial power - Islamic banking and finance - Court to refer questions concerning Shariah matter to Shariah Advisory Council (SAC) - Whether an usurpation of court's judicial power - Whether ss. 56 and 57 Central Bank of Malaysia Act* G *2009 valid, constitutional and had retrospective effect - Central Bank of Malaysia Act 1958 (Repealed), s. 16B*

The respondent/defendant ('Bank Islam') had, in 2001, extended an *'Al-Bai Bithaman Ajil'* Islamic financing facility ('BBA facility') to H the appellant/plaintiff ('Khalid'). On 10 May 2007, Khalid instituted a High Court suit against Bank Islam ('Khalid's suit') seeking, *inter alia*, declarations that Bank Islam was in breach of its licence issued under s. 3 of the Islamic Banking Act 1983. On 24 May 2007, Bank Islam filed a separate High Court suit ('Bank Islam's I suit') against Khalid for breaches of the terms of the BBA facility,

seeking recovery of monies due and owing from Khalid. Khalid's suit and Bank Islam's suit were consolidated ('the consolidated suits') *vide* order of court dated 15 May 2008, with Khalid as the plaintiff and Bank Islam as the defendant. On 13 June 2011, Bank Islam made an application to the High Court to refer to the Shariah Advisory Council ('SAC') for its ruling on Shariah questions arising in the consolidated suits. Khalid objected to the said application. The High Court judge, Zawawi Salleh J ('the High Court judge') heard the application and held that there were Shariah questions which he identified and referred to the SAC for its ruling. Thereafter, Khalid lodged the instant appeal. The issues that arose in this appeal were (i) whether the High Court was *functus officio* in view of a previous reference by Rohana Yusof J in the case of *Tan Sri Khalid Ibrahim v. Bank Islam Malaysia Bhd and Another Case* under s. 16B of the (then) Central Bank of Malaysia Act 1958 ('the (then) 1958 Act'); (ii) whether the High Court judge erred in failing to appreciate that ss. 56 and 57 of the Central Bank of Malaysia Act 2009 ('the Act') were unconstitutional, being in contravention of Part IX and arts. 8 and 74 of the Federal Constitution, in that the SAC was "usurping" the functions of the courts in ascertaining Islamic law; and (iii) whether ss. 56 and 57 of the Act had retrospective effect.

Held (dismissing appeal with costs in cause)
Per Low Hop Bing JCA delivering the judgment of the court:

(1) Upon a careful reading of Rohana Yusof J's judgment, the so-called previous "reference" under s. 16B of the (then) 1958 Act was merely a request for information as to whether there was any existing ruling by the SAC pertaining to the BBA contracts. That being the case, it was abundantly clear that there was no reference whatsoever to the SAC for a ruling on Shariah questions. The SAC was not asked to answer any specific question. Thus, there was no error on the part of the High Court judge in classifying the request as an enquiry to be made to the SAC as to whether a ruling had been made on the status of the BBA agreement. Hence, the High Court could not be said to be *functus officio* or to have "spent" the power to make a reference. (paras 15 & 16)

(2) Sections 56 and 57 of the Act contain clear and unambiguous provisions to the effect that whenever there is any Shariah question arising in any proceedings relating to the Islamic financial business, it is mandatory to invoke s. 56 and refer it to the SAC, a statutory expert, for a ruling. The duty of the SAC is confined exclusively to the ascertainment of the Islamic law on financial matters or business. The fact that the court is bound by the ruling of the SAC under s. 57 does not detract from the judicial functions and duties of the court in providing a resolution to the dispute which the parties had submitted to the jurisdiction of the court. The SAC, like any other expert, does not perform any judicial function in the determination of the ultimate outcome of the litigation before the court, and so could not be said to usurp the judicial functions of the court. Hence, ss. 56 and 57 are valid and constitutional. (para 25)

(3) Sections 56 and 57 of the Act merely introduced and applied a procedure as far as Shariah questions were concerned. Under the (then) 1958 Act, which was in force until 24 November 2009, the SAC's statutory duties and powers to make rulings as a statute-appointed expert, by ascertaining Islamic law for the purpose of Islamic financial matters or business on Shariah questions, were already in existence. The word used in the (then) s. 16B was "may". With effect from 25 November 2009, the discretionary power of the court (to refer any Shariah question to the SAC when such a question was before the court) was amended to make the reference mandatory, and consequently the SAC's ruling made pursuant to a reference was now binding on the court by virtue of the word "shall" expressly enacted in ss. 56 and 57. In the circumstances, the High Court judge was correct in taking the position that ss. 56 and 57 had retrospective effect. (paras 30 & 31)

Bahasa Malaysia *Translation Of Headnotes*

Responden/defendan ('Bank Islam') telah, pada tahun 2001, memberikan kemudahan pembiayaan Islam 'Al-Bai Bithaman Ajil' ('kemudahan BBA') kepada perayu/plaintif ('Khalid'). Pada 10 Mei 2007, Khalid telah memulakan guaman Mahkamah Tinggi terhadap Bank Islam ('guaman Khalid') menuntut, antara lain, deklarasi-deklarasi bahawa Bank Islam telah melanggar lesennya

yang dikeluarkan di bawah s. 3 Akta Bank Islam 1983. Pada 24 Mei 2007, Bank Islam telah memfailkan guaman Mahkamah Tinggi berasingan ('guaman Bank Islam') terhadap Khalid kerana melanggar syarat-syarat kemudahan BBA, menuntut wang yang kena dibayar dan terhutang daripada Khalid. Guaman Khalid dan guaman Bank Islam telah digabungkan ('guaman-guaman yang digabungkan') melalui perintah mahkamah bertarikh 15 Mei 2008, dengan Khalid sebagai plaintif dan Bank Islam sebagai defendan. Pada 13 Jun 2011, Bank Islam telah membuat permohonan kepada Mahkamah Tinggi untuk merujuk kepada Majlis Penasihat Syariah ('MPS') terhadap keputusannya mengenai persoalan-persoalan Shariah yang timbul dalam guaman-guaman yang digabungkan. Khalid membantah permohonan tersebut. Hakim Mahkamah Tinggi, Zawawi Salleh H ('Hakim Mahkamah Tinggi') mendengar permohonan tersebut dan memutuskan bahawa terdapat persoalan-persoalan Shariah yang patut dirujuk kepada MPS untuk keputusannya. Seterusnya, Khalid membuat rayuan ini. Isu-isu yang timbul di dalam rayuan ini adalah (i) sama ada Mahkamah Tinggi *functus officio* memandangkan terdapatnya rujukan sebelumnya oleh Rohana Yusof H di dalam kes *Tan Sri Khalid Ibrahim v. Bank Islam Malaysia Bhd and Another Case* di bawah s. 16B Akta Bank Negara Malaysia 1958 (yang sudah dimansuhkan) ('Akta 1958 terdahulu'); (ii) sama ada hakim Mahkamah Tinggi khilaf apabila gagal menghargai bahawa ss. 56 dan 57 Akta Bank Negara Malaysia 2009 ('Akta') adalah tidak berperlembagaan, kerana ia melanggar Bahagian IX dan per. 8 dan 74 Perlembagaan Persekutuan, dan dengan itu, MPS telah "merampas" fungsi-fungsi mahkamah dalam menentukan undang-undang Islam; dan (iii) sama ada ss. 56 dan 57 Akta mempunyai kesan retrospektif.

Diputuskan (menolak rayuan dengan kos dalam kausa)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Apabila membaca penghakiman Rohana Yusof H dengan teliti, "rujukan" yang dibuat sebelum ini di bawah s. 16B Akta 1958 (terdahulu) adalah sekadar permintaan untuk maklumat sama ada terdapat keputusan yang wujud oleh MPS berkaitan kontrak-kontrak BBA. Dengan itu, ia jelas bahawa tiada rujukan sekalipun pada MPS untuk keputusan berkenaan persoalan-persoalan Shariah. MPS tidak diminta untuk menjawab apa-apa soalan yang khusus. Oleh itu, hakim Mahkamah Tinggi tidak khilaf apabila mengklasifikasikan permintaan sebagai siasatan yang harus dibuat pada MPS

berkenaan sama ada keputusan telah dibuat ke atas status persetujuan BBA. Dengan itu, Mahkamah Tinggi tidak boleh dikatakan *functus officio* atau telah kehilangan kuasa untuk membuat rujukan.

(2) Seksyen-seksyen 56 dan 57 Akta mengandungi peruntukan-peruntukan yang nyata dan jelas yang membawa kesan bahawa apabila terdapat persoalan Shariah yang timbul dalam mana-mana prosiding berhubungan dengan urusan kewangan Islam, adalah wajib menggunakan s. 56 dan merujuknya kepada MPS, pakar berkanun, untuk keputusan. Kewajipan MPS adalah terhad kepada penentuan undang-undang Islam mengenai perkara-perkara kewangan atau perniagaan. Fakta bahawa mahkamah terikat dengan keputusan MPS di bawah s. 57 tidak menjejaskan fungsi kehakiman dan kewajipan mahkamah dalam menyediakan resolusi untuk pertikaian yang telah dikemukakan oleh pihak-pihak yang terlibat kepada bidang kuasa mahkamah. MPS, seperti pakar-pakar lain, tidak melaksanakan apa-apa fungsi kehakiman dalam penentuan keputusan muktamad tindakan undang-undang di mahkamah, dan oleh itu tidak boleh dikatakan merampas fungsi kehakiman mahkamah. Oleh itu, ss. 56 dan 57 adalah sah dan berperlembagaan.

(3) Seksyen-seksyen 56 dan 57 Akta semata-mata memperkenalkan dan menggunakan suatu prosedur hanya kepada persoalan-persoalan Shariah. Di bawah Akta 1958 terdahulu, yang berkuatkuasa sehingga 24 November 2009, kewajipan berkanun dan kuasa MPS untuk membuat keputusan sebagai pakar undang-undang yang dilantik, dalam menentukan undang-undang Islam bagi maksud hal-hal kewangan dan perniagaan Islam atas persoalan-persoalan Shariah, sudah wujud. Perkataan yang digunakan dalam s. 16B (terdahulu) adalah "may". Berkuatkuasa dari 25 November 2009, kuasa budi bicara mahkamah (untuk merujuk apa-apa persoalan Shariah kepada MPS apabila persoalan itu dibangkitkan di mahkamah) dipinda untuk membuat rujukan itu wajib, dan akibatnya keputusan MPS yang dibuat menurut rujukan adalah kini terikat dengan mahkamah menurut perkataan "shall" yang digubal dengan jelas dalam ss. 56 dan 57. Dalam keadaan sedemikian, hakim Mahkamah Tinggi betul apabila mengambil pendirian bahawa ss. 56 dan 57 mempunyai kesan retrospektif.

Case(s) referred to:

Dato' Hari Menon v. Texas Encore LLC & Ors [2005] 2 CLJ 688 HC ***(foll)***

Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98 FC ***(foll)***

Faridah Begum Abdullah v. Sultan Haji Ahmad Shah Al Mustain Billah Ibni Almarhum Sultan Abu Bakar Ri'ayatuddin Al Mu'adzam Shah (Sued in his Personal Capacity) [1996] 2 CLJ 159 SC ***(foll)***

Mohd Alias Ibrahim v. RHB Bank Bhd & Anor [2011] 4 CLJ 654 HC ***(foll)***

Pantai Bayu Emas Sdn Bhd & Ors v. Southern Bank Bhd [2009] 2 CLJ 644 CA ***(foll)***

PP v. Mohd Noor Jaafar [2006] 1 CLJ 103 HC ***(refd)***

Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor [1999] 1 CLJ 481 CA ***(foll)***

Tan Sri Abdul Khalid Ibrahim v. Bank Islam Malaysia Bhd and Another Case [2010] 4 CLJ 388 HC ***(refd)***

Legislation referred to:

Central Bank of Malaysia Act 2009, ss. 16B, 56
Courts of Judicature Act 1964, s. 84
Federal Constitution, arts. 8, 74(1), 121(1)
Islamic Banking Act 1983, ss. 3, 56, 57

For the appellant - Malik Imtiaz Sarwar (Asma Mohd Yunus & Azinuddin Karim with him); M/s Thomas Philip

For the respondent - Tommy Thomas (Ganesan Nethi with him); M/s Tommy Thomas

[Editor's note: For the High Court judgment, please see Tan Sri Abdul Khalid Ibrahim v. Bank Islam Malaysia Bhd [2012] 3 CLJ 249.]

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] The appellant/plaintiff ("Khalid") has brought this appeal against the decision of Zawawi Salleh J in allowing the respondent/defendant's ("Bank Islam's") application in encl. 59 ("the application") to refer Shariah questions to Bank Negara's Shariah Advisory Council ("SAC") for its ruling pursuant to s. 56 of the Central Bank of Malaysia Act 2009 ("the Act").
(A reference hereinafter to a section is a reference to that section in the Act).

[2] We have been informed by learned counsel that on the issues raised in this appeal, so far there has been no reported judgment by the Court of Appeal. We now set out our view on the new vista ventilated in this appeal which we dismissed on 14 May 2012.

Factual Background

[3] In 2001, Bank Islam extended an 'Al-Bai Bithaman Ajil' Islamic financing facility ("BBA facility") to Khalid. The terms of the BBA facility are expressly stated in Bank Islam's Letter of Offer dated 17 April 2001, a Master Revolving BBA Agreement dated 30 April 2001, a Memorandum of Charge of Shares, a Fund Administration and Custodian Agreement and an Asset Purchase Agreement dated 30 April 2001 (collectively, "the BBA facility agreements").

[4] On 10 May 2007, Khalid instituted a High Court Suit against Bank Islam ("Khalid's suit") seeking *inter alia* declarations that:

(1) Under the Islamic Banking Act 1983, the BBA facility agreements were agreements which Bank Islam was not licensed to offer and/or enter into; and

(2) The BBA facility was not in accordance with the religion of Islam and hence Bank Islam was in breach of its licence issued under s. 3 of the Islamic Banking Act 1983.

[5] On 24 May 2007, Bank Islam filed a separate High Court Suit ("Bank Islam's suit") against Khalid for breaches of the terms of the BBA facility, seeking recovery of monies due and owing from Khalid.

[6] Khalid's suit and Bank Islam's suit were consolidated ("the consolidated suits") *vide* order of court dated 15 May 2008, with Khalid as the plaintiff, and Bank Islam as the defendant in the consolidated suits.

[7] On 13 June 2011, Bank Islam made the application to the High Court to refer to the SAC for its ruling on Shariah questions arising in the consolidated suits.

[8] Khalid objected on the ground, *inter alia*, that s. 56 and s. 57 were unconstitutional.

[9] On 13 July 2011, pursuant to s. 84 of the Courts of Judicature Act 1964, the High Court referred the question concerning the constitutionality of s. 56 and s. 57 to the Federal Court for its determination, but the Federal Court declined to do so because the High Court has yet to make a ruling on whether there existed any Shariah question in the consolidated suits. The Federal Court then remitted the matter to the High Court.

[10] On 18 November 2011, Zawawi Salleh J heard the application. On 1 December 2011, he held that there were Shariah questions which he identified and referred to the SAC for its ruling.

[11] Thereafter, Khalid lodged the instant appeal.

Previous "Reference": *Functus Officio*

[12] Learned counsel Mr Malik Imtiaz Sarwar (Ms Asma Mohd Yunus and Mr Azinuddin Karim with him) argued for Khalid that Zawawi Salleh J had failed to appreciate that the court's power to refer the Shariah questions was "spent" or the High Court was *functus officio* in view of a previous "reference" by Rohana Yusuf J in *Tan Sri Abdul Khalid Ibrahim v. Bank Islam Malaysia Bhd and Another Case* [2010] 4 CLJ 388; [2009] 6 MLJ 416 HC ("Rohana J's judgment") under s. 16B of the (then) Central Bank of Malaysia Act 1958 ("the (then) 1958 Act").

[13] Bank Islam's learned counsel, Mr Tommy Thomas (assisted by Mr Ganesan Nethi) asserted that, in fact, Zawawi Salleh J had correctly appreciated that the so-called previous "reference" made by Rohana Yusuf J to the SAC pursuant to s. 16B of the (then) 1958 Act was a request to the SAC to ascertain if there was any existing ruling by the SAC in respect of *'Bai Bithaman Ajil'* Islamic financing contracts ("BBA contracts"). It was not a reference to the SAC for a ruling on a Shariah question.

[14] The essence of the question raised in the aforesaid submissions may be formulated as follows:

> Upon a proper perusal of Rohana J's judgment, was the High Court *functus officio* and hence the power of the High Court to make a reference to the SAC was 'spent' in view of a previous 'reference'?

[15] Upon a careful reading of Rohana J's judgment, we have no difficulty in holding that the so-called previous "reference" under s. 16B of the (then) 1958 Act was merely a request for information as to whether there was any existing ruling by the SAC pertaining to BBA contracts. At p. 400 (CLJ); p. 426 A-B (MLJ) thereof, Rohana Yusuf J has rightly said, "I had caused an enquiry to be made to the SAC as to whether a ruling has been made on the status of the BBA agreement". That being the case, it is abundantly clear to us that there was no reference whatsoever to the SAC for a ruling on Shariah questions. The SAC was not asked to answer any specific question.

[16] In the circumstances, we find no error on the part of Zawawi Salleh J in classifying the request as an enquiry to be made to the SAC as to whether a ruling has been made on the status of the BBA agreement. It is certainly not a reference to the SAC for its determination on a specific Shariah question. As there was no previous reference to the SAC for a ruling, the High Court could not be said to be *functus officio* or to have "spent" the power to make a reference. Zawawi Salleh J is able to make the reference which has now become the subject matter of the instant appeal. Our answer to the above question is therefore in the negative.

Constitutionality Of s. 56 And s. 57

[17] Khalid's second point was that Zawawi Salleh J erred in failing to appreciate that s. 56 and s. 57 are unconstitutional, being in contravention of Part IX and arts. 8 and 74 of the Federal Constitution, in that the SAC is "usurping" the functions of the courts in ascertaining Islamic law. (A reference hereinafter to a Part and an article is a reference to that Part and article in the Federal Constitution).

[18] In response, Bank Islam relied on art. 74(1), Part IX and art. 121 to support the contention that s. 56 and s. 57 are constitutional.

[19] These submissions touching on the constitutionality or otherwise of s. 56 and s. 57 attract the application of the principles of constitutional interpretation. I have the privilege of embarking on a discussion of these principles in eg, *PP v. Mohd Noor Jaafar* [2006] 1 CLJ 103; [2005] 6 MLJ 745 HC; *Dato' Hari*

Menon v. Texas Encore LLC & Ors [2005] 2 CLJ 688; [2005] 4 MLJ 506 HC; and *Pantai Bayu Emas Sdn Bhd & Ors v. Southern Bank Bhd* [2009] 2 CLJ 644; [2008] 6 MLJ 649 CA. Other authorities which incorporated these principles include *Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus* [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98; [1981] 1 MLJ 29 FC; *Faridah Begum Abdullah v. Sultan Haji Ahmad Shah Al Mustain Billah Ibni Almarhum Sultan Abu Bakar Ri'ayatuddin Al Mu'adzam Shah (Sued in his Personal Capacity)* [1996] 2 CLJ 159; [1996] 1 MLJ 617 SC; and *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 CLJ 481; [1999] 1 MLJ 266 CA. As these principles have been succinctly stated therein, we respectfully adopt and apply them in our interpretation of the aforesaid provisions of the Federal Constitution.

[20] We take the view that the constitutionality of s. 56 and s. 57 is to be tested by reference to the legislative powers of Parliament to enact these sections. Article 74(1) empowers Parliament to make laws with respect to any of the matters enumerated in the Federal List (List 1), or the Concurrent List (List 3), of the Ninth Schedule to the Federal Constitution. Item 4(k) of List 1 clearly provides that Parliament is empowered to make laws in respect of:

> 4. Civil and criminal law and procedure and the administration of justice, including:
>
> …
>
> (k) ascertainment of Islamic law and other personal laws for purposes of federal law.

[21] Banking is a matter within the Federal List and the Islamic Banking Act 1983 as well as the Central Bank of Malaysia Act 2009 are clearly federal laws. Thus, s. 56 and s. 57 are within the Parliament's power to enact. (I am grateful to my learned sister Zaharah binti Ibrahim JCA for her suggestion to include this paragraph as an integral part of our judgment herein).

[22] Section 56 and s. 57 are applicable without discrimination to all parties who are in the same circumstances and so cannot be said to have contravened art. 8 governing fundamental liberties generally and equality before the law as well as equal protection of the law specifically.

[23] On the issue as to whether there is any usurpation by the SAC of the powers and jurisdiction of the courts, we need only to examine Part IX which provides for the judiciary and the functions, powers and jurisdiction of the courts. Under this Part, art. 121(1) vests the judicial powers of the Federation in the courts in such manner as may be conferred by or under the federal law. So long as the Parliament in its wisdom enacts laws for this subject matter, our courts shall be competent to perform the functions, or to exercise the powers and jurisdiction conferred thereunder.

[24] Next, the statutory duty and function of the SAC is to ascertain Islamic financial matters or business only. It does not hear evidence nor decide cases. Section 56 and s. 57 merit reproduction as follows:

> **56. Reference to Shariah Advisory Council for ruling from court or arbitrator**
>
> (1) Where in any proceedings relating to Islamic financial business before any court or arbitrator any question arises concerning a Shariah matter, the court or the arbitrator, as the case may be shall:
>
> (a) take into consideration any published rulings of the Shariah Advisory Council; or
>
> (b) refer such question to the Shariah Advisory Council for its ruling.
>
> (2) Any request for advice or a ruling of the Shariah Advisory Council under this Act or any other law shall be submitted to the secretariat.
>
> 57. Effect of Shariah rulings
>
> Any ruling made by the Shariah Advisory Council pursuant to a reference made under this Part shall be binding on the Islamic financial institutions under Section 55 and the court or arbitrator making a reference under Section 56.

[25] Section 56 and s. 57 contain clear and unambiguous provisions to the effect that whenever there is any Shariah question arising in any proceedings relating to Islamic financial business before, eg, any court, it is mandatory for the court to invoke s. 56 and refer it to the SAC, a statutory expert, for a ruling. The duty of the SAC is confined exclusively to the ascertainment of the Islamic law on financial matters or business.

A The judicial function is within the domain of the court, ie, to decide on the issues which the parties have pleaded. The fact that the court is bound by the ruling of the SAC under s. 57 does not detract from the judicial functions and duties of the court in providing a resolution to the dispute(s) which the parties have
B submitted to the jurisdiction of the court. In applying the SAC ruling to the particular facts of the case before the court, the judicial functions of the court to hear and determine a dispute remain inviolated. The SAC, like any other expert, does not perform any judicial function in the determination of the ultimate
C outcome of the litigation before the court, and so cannot be said to usurp the judicial functions of the court. Hence, s. 56 and s. 57 are valid and constitutional.

Do s. 56 And s. 57 Have Retrospective Effect?

D **[26]** Khalid's third and final point is that the learned judge had erred in holding that s. 56 and s. 57 have retrospective effect.

[27] Bank Islam responded that no error was occasioned by the High Court.

E **[28]** The question here is whether s. 56 and s. 57 have retrospective effect.

[29] In our view, s. 56 and s. 57 would not and cannot have
F retrospective effect if there has been a deprivation of Khalid's pre-existing rights. However, there is no such deprivation in the instant appeal; s. 56 and s. 57 merely introduce and apply a procedure as far as Shariah questions are concerned. Under the (then) 1958 Act, which was in force until 24 November 2009, the
G SAC's statutory duties and powers to make rulings as a statute-appointed expert, by ascertaining Islamic law for the purpose of Islamic financial matters or business on Shariah questions, were already in existence. The word used in the (then) s. 16B was "may". With effect from 25 November 2009, the discretionary
H power of the court (to refer any Shariah Question to the SAC when such a question is before the court) was amended to make the reference mandatory, and consequently the SAC's ruling made pursuant to a reference is now binding on the court by virtue of the word "shall" expressly enacted in s. 56 and s. 57.

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[30] In the circumstances, we hold that Zawawi Salleh J is correct in taking the position that s. 56 and s. 57 have retrospective effect.

[31] As a matter of fact, the aforesaid three grounds have actually been ventilated and dealt with by Zawawi Salleh J in *Mohd Alias Ibrahim v. RHB Bank Bhd & Anor* [2011] 4 CLJ 654; [2011] 3 MLJ 26 HC, wherein the learned judge had also correctly stated the law. We hereby affirm his well-considered grounds expressed therein.

Conclusion

[32] It is plain to us that Khalid's appeal is devoid of merits. We dismiss this appeal with costs in the cause as agreed by the parties herein. Deposit to be refunded to Khalid as the appellant.